



**Ogola v Sanlam General Insurance Limited (Cause E0865 of 2022)
[2024] KEELRC 554 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 554 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E0865 OF 2022**

**SC RUTTO, J
MARCH 8, 2024**

BETWEEN

CHRISTIAN BASIL OGOLA CLAIMANT

AND

SANLAM GENERAL INSURANCE LIMITED RESPONDENT

RULING

1. What comes up for determination is the Claimant's Notice of Motion Application dated 4th October 2023, through which he seeks the following orders:
 - a. Spent.
 - b. That the Honourable Court be pleased to grant leave to the Applicant to reopen its case limited to calling before court witnesses who are employees of the Respondent and were directly involved in issues that relates and were pertinent to the Claimant (*sic*) termination from employment as provided for in the Claimant/Applicant supplementary lists of witnesses.
 - c. That the Honourable Court be pleased to grant leave to the Claimant/Applicant to reopen its case limited to presenting witness no. 1,2 and 3 on the claimant's list of supplementary list of witnesses for purposes of producing documents as contained in the Claimant(*sic*) supplementary list of bundle of documents.
 - d. That the Honourable Court do issue to all the witnesses as contained in the Claimant's supplementary list of witnesses viz Matt Gichuki (internal assessors), SK Ngugi (Vision Motor Consultant), Fredrick Mutwiri (Elite Automobile & Assessors), George Kuria (CEO General-Insurance) and Susan Kakai (Human Resource Manager).
 - e. That costs of the Application be in the cause.



2. The Application is supported by the grounds appearing on its face and on the Affidavit of the Claimant sworn on 4th October 2023. Briefly, Mr. Ogola avers that the witnesses he seeks to have summoned are crucial for his case and the evidence they will produce will shed more light on the processes and procedures at the Respondent company. He believes that their testimony will set the record straight on the decisions that informed his actions while working with the Respondent.
3. The Claimant further deposes that he seeks to summon Matt Muriuki (Internal assessors), SK Ngugi (Vision Motor Consultant), Fredrick Mutwiri (Elite Automobile & Assessors), George Kuria (CEO General Insurance) and Susan Kakai (Human Resource Manager) to come to Court and testify before he closes his case.
4. According to Mr. Ogola, the said persons are well known to him and have key information relating to his tenure with the Respondent and more importantly, they did play a key role in his dismissal from employment.
5. He further avers that George Kuria the CEO General Insurance, in the matter of KENGEN, issued the final instructions on which brokers business cover should be confirmed and which one was to be declined. In the matter of the vehicle write-off, he made the final decision on who the salvage should be released to and instructed the Claims Manager as such.
6. Mr. Ogola further states that Susan Kakai, the Human Resource Manager was responsible for advising the CEO on the correct process and procedures relating to the disciplinary process. He contends that she would be in a position to shed light on why two show cause letters were issued, and why no supporting documentation nor the minutes were issued as required by the handbook.
7. With regards to Matt Gichuki, Mr. Ogola avers that he had the responsibility to review vehicle assessment reports from the external assessor and advise the company on whether to write off a vehicle or not. He prepared a report on the state of the vehicle and provided technical advice on whether to write it off and the salvage prize to be applied. Mr. Ogola opines that one of the points raised in the show cause letter was the reserve price of the salvage.
8. As to SK Ngugi of Vision Assessor, Mr. Ogola states that together with Elite assessors, they carried out a second review of the vehicle and issued a joint report giving the repairability of the vehicle and also recommending a salvage value. He will be in a position to explain the technicality of reviewing an accident vehicle and how repair costs are arrived at. Mr. Ogola further deposes that Fredrick Mutwiri of Elite Auto Assessors, External Assessors issued a joint report with Vision assessors as above.
9. The Respondent opposed the Application through the Replying Affidavit of Ms. Gladys Muema, who describes herself as its Senior Legal Officer.
10. Ms. Muema avers that the Claimant has not given any reasonable ground, to warrant this Honourable Court exercising its discretion to allow him to re-open his case.
11. She further deposes that it is completely unnecessary to summon Matt Gichuki, S.K Ngugi and Fredrick Mutwiri for the following reasons:
 - i. The documents contained in the Claimant's supplementary Bundle of documents were produced by the Claimant and admitted into this Honourable Court's record during the hearing held on 25th July 2023.
 - ii. The emails contained in the Claimant's supplementary Bundle of documents were emails sent by the Claimant or received by him from others. The Claimant has completely produced the said emails before this Honourable Court without objections from the Respondent.



- iii. The documents contained in the Claimant's supplementary Bundle of documents are not disputed.
 - iv. A number of documents contained in the Claimant's supplementary Bundle of documents are also contained in the Respondent's list and Bundle of documents dated 4th April 2023. The said documents are therefore common to both parties.
12. Ms. Muema further avers that the said individuals comprise a former employee of the Respondent and suppliers of the Respondent hence are its potential witnesses in the case. In the same vein, she avers that George Kuria and Susan Kakai are in active employment with the Respondent and therefore comprise potential witnesses for the Respondent in the case.
 13. She further contends that the Claimant has not demonstrated that all the 5 individuals whom he seeks to have summoned to appear as his witnesses are newly discovered witnesses.
 14. Ms. Muema further avers that the Respondent is opposed to summons being issued to compel the 5 individuals to attend Court to testify on behalf of the Claimant as this would amount to interfering with its case and violating its right to a fair trial.
 15. According to Ms. Muema, the Claimant's application for witness summons to be issued to the 5 individuals is mischievous and is made with ulterior motives.
 16. Further, she verily believes that the intention of the Claimant in attempting to force the 5 witnesses to attend Court and give testimony on his behalf as his witnesses is to settle scores with them by embarrassing and humiliating them.
 17. She is further advised by the Respondent's Advocates on record and she verily believe that in an unfair termination claim, the onus and burden fall on the employer to prove the reasons for the employee's termination and the process followed in the lead up to the employee's termination.
 18. In Ms. Muema's view, the Claimant will have the opportunity to test and challenge the Respondent's position through cross-examination of its witnesses. The move to preemptively summon the Respondent's witnesses is therefore irregular and violates its rights.
 19. She further contends that the Claimant is seeking to interfere with and control the manner in which the Respondent will discharge its burden of proof.
 20. Ms. Muema maintains that when the Respondent gets an opportunity to present its case, it should be left to call the witnesses that best suit its case.

Submissions

21. The parties agreed to canvass the Application by way of written submissions. On the Claimant's part, it was submitted that the Respondent will not suffer any prejudice since it will have the opportunity to cross-examine his witnesses if it so wishes. The Claimant further submitted that re-opening the case will entail allowing the Respondent an opportunity to rebut the testimony by the witnesses to be called. To this end, the case of *Kenya Commercial Bank Limited v Nicholas Ombija* (2009) eKLR was referenced in support of the Claimant's submissions.
22. The Claimant further argued that he will suffer prejudice if the orders sought are not granted since he would be prevented from bringing all his evidence before the Court and that would impact his constitutional right to be heard.



23. It was his further submission that the Respondent will not suffer any prejudice if the summons are issued limited to producing the documents as listed in his supplementary list of documents and shedding more light on the internal process and procedures of the Respondent company. He further contended that the documents sought to be adduced before this Honourable Court have all along been in his Bundle of Documents and the Respondent is privy to them and has the documents with them.
24. The Claimant further termed the Respondent's argument that the witnesses sought to be summoned are potentially its witnesses, as far-fetched and too remote, in that the Respondent has not made any attempt to list them in their pleadings. In this regard, the Claimant urged the Court not to base its decision on whether the Respondent would or would not call the said witness. He argued that at the point of summoning the witnesses, the Respondent had not indicated in any way its desire to summon the said witnesses.
25. Placing reliance on the case of *Ladd v Marshall* (1954) 3 All ER 745, *Mohamed Abdi Mobammud v Ahmed Abdullabi Mohamed & 3 others* (2015) eKLR, the Claimant further submitted that he had satisfied the criteria for the reception of new evidence.
26. The Respondent while acknowledging that this Court has the power and discretion to order the reopening of a case, argued that the same can only be ordered where it is shown that the evidence in question could not have been obtained with reasonable diligence for use earlier at the trial; that the evidence in question is relevant and, if admitted, it would probably have an important influence on the result of the case; and further, that the evidence in question is credible. In support of this position, the Respondent invited the Court to consider the determination in *Samuel Kiti Lewa v Housing Finance Co. of Kenya Limited & another* (2015) eKLR, *Simba Telecom v Karuhanga & Anor* (2014) UGHC 98 and *Ladd v Marshall* (1954) 3 All ER 745.
27. It was the Respondent's further submission that the documentary evidence that the Claimant is seeking to produce is not new/additional evidence rather, it is existing evidence that has already been admitted. It was the Respondent's position that part of the documentary evidence that the Claimant is seeking to produce is common to both parties.
28. The Respondent further argued that the issuance of witness summons is subject to principles and cannot be done willy-nilly.
29. Placing reliance on the case of *Oliver Mukunza v AC Nielsen Kenya Limited* (2018) eKLR, the Respondent argued that in an unfair termination claim as the one herein, the onus and burdens fall on the employer, to prove that the reasons for the employee's termination and the process followed in the lead up to the employee's termination.

Analysis and Determination

30. For starters, I wish to point out that at the time of filing the instant Application, the Claimant was yet to close his case as he was in the middle of being cross-examined by the Respondent's Advocate. Therefore, it is my respectful view that the prayer seeking to reopen the Claimant's case does not lie at this stage and is not capable of being granted.
31. Accordingly, to my mind the sole issue for determination is whether the persons, identified, that is, Matt Muriuki, S.K. Ngugi, Fredrick Mutwiri, George Kuria and Susan Kakai, should appear in Court as witnesses, to testify in the matter.



32. Pursuant to Section 20 (4) of the Employment and Labour Relations Court Act (ELRC Act), the Court may require any person to; attend before it; give evidence on oath or otherwise; and to produce any relevant documents.

33. To further give effect to the aforesaid provision, Rule 18 (2) of the Employment and Labour Relations Court (Procedure) Rules (2016), provides as follows: -

“ [18.]

(1)

(2) The Court may summon any person or expert for the purposes of examination of facts and full adjudication of a dispute.

34. It is notable that the aforesaid Rule 18 (2) which is to be read together with the Court’s powers under Section 20(4) of the ELRC Act, is provided for under the title, case management. Therefore, it follows that a party requiring the attendance of any witness for purposes of giving evidence is required to make such an Application at any time before the pretrial conference or at the case management stage.

35. As stated herein, the instant Application has been brought midway through the Claimant’s case, hence logically, the matter is way past the pretrial stage.

36. In light of the foregoing, I find the timing of the Application not suitable. With tremendous respect to the Claimant, the instant Application comes as an afterthought.

37. Besides, the documents sought to be produced by the witnesses the Claimant seeks to summon have already been admitted as part of his exhibits. It thus serves no purpose for another witness to come and produce the same documents.

38. In addition to the foregoing, it bears to note that this being a matter relating to unfair termination from employment, the Respondent is required under Sections 41, 43, 45 and 47(5) of the Employment Act, to prove the reasons for the termination and the process applied in effecting such termination.

39. As such, it should not be the Claimant’s problem how the Respondent will discharge its evidential burden under the aforesaid Sections 41, 43, 45 and 47(5) of the Employment Act.

40. The upshot of the foregoing is that the Application dated 4th October 2023 is found to be without merit and is disallowed.

41. Accordingly, the matter shall proceed for further hearing.

42. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

No appearance for the Claimant/Applicant

Mr. Omondi for the Respondent

Millicent Kibet Court Assistant



Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

